

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA

Plaintiff/Appellee,

v.

DAVID B. ARNOLD,

Defendant/Appellant.

Case No. 3:15-cv-00109-MMD-WGC

ORDER

I. SUMMARY

This case involves an appeal of the magistrate judge's judgment finding David Arnold ("Arnold") guilty on his plea of nolo contendere to four citations originating out of the Central District of California pursuant to 18 U.S.C. § 3402. Arnold seeks to set aside his nolo contendere pleas based on the absence of a written waiver consenting to transfer of venue to the District of Nevada. The government argues that Arnold's appeal was untimely and improper; and because Arnold knowingly and willingly consented to the transfer of the citations to the District of Nevada, the absence of a written waiver of venue was a ministerial failure that does not affect the legitimacy of Arnold's convictions. The Court finds that Arnold's waiver of venue was knowing and voluntary and affirms the decision of the magistrate judge.

II. BACKGROUND

On January 29, 2015, Arnold was arrested near Reno for five outstanding warrants out of California and Montana relating to improper camping on federal land.

1 (Dkt. no. 35 at 3-4.) He was assigned a public defender and agreed to a plea agreement
2 wherein he would plead nolo contendere to four California violations and the remaining
3 Montana charge would be dismissed. (*Id.* at 4.) At a hearing held on January 30, 2015,
4 before the United States Magistrate Judge William G. Cobb, Arnold pled nolo contendere
5 to the four California citations. Magistrate Judge Cobb asked Arnold if he wished to have
6 the California charges transferred to Nevada, and Arnold replied affirmatively.¹ (*Id.*)
7 Pursuant to the plea agreement, Judge Cobb imposed a fine of \$140 to be paid in two
8 payments. (*Id.* at 5.) Arnold was released from custody later that day. He made the first
9 of the two payments on time. (*Id.* at 5-6.)

10 On February 10, 2015, Arnold mailed a document entitled "Motion for
11 Reconsideration" directly to Judge Cobb's chambers, and he faxed the same document
12 the next day. (Dkt. nos. 2, 3.) Arnold prepared the Motion for Reconsideration pro se
13 without the aid of Arnold's appointed counsel. (Dkt. no. 35 at 6.) The Motion for
14 Reconsideration stated, in part, "[i]f any of this is denied, I reserve the right to request
15 Review by a District Judge or Appeal to a higher court." (Dkt. no. 2 at 1.) Arnold also filed
16 an objection seeking to appeal the Magistrate Judge's decision to the district court. (Dkt.
17 no. 5.)

18 The Magistrate Judge issued a minute order accepting the Motion for
19 Reconsideration as a case filing and setting a date for a hearing. (Dkt. no. 1.) Arnold's
20 appointed counsel filed a motion to withdraw as counsel on February 25, 2015 (dkt. no.
21 10) and a notice of appeal on February 26, 2015 (dkt. no 12). On March 12, 2015, the
22 Magistrate Judge granted counsel's motion to withdraw and appointed substitute counsel
23 to represent Arnold. (Dkt. no. 16.)

24 Arnold's newly appointed counsel filed a motion to withdraw the Motion for
25 Reconsideration (dkt. no. 27), which the Magistrate Judge set for hearing on April 13,
26 2015. During that hearing, the Magistrate Judge granted the motion to withdraw the

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28 ¹By consenting to the transfer of the California citations to be heard in this district,
Arnold avoided being held in custody to be transferred to the Central District of
California. (Dkt. no.36-1 at 113.)

1 Motion for Reconsideration. (Dkt. no. 29.) The parties agreed that the appropriate means
2 to resolve a challenge to Arnold's plea was an appeal to a district court judge. (Dkt. no.
3 31 at 4.)

4 Arnold filed his opening brief on August 17, 2015. (Dkt. no 35.) The government
5 filed its answering brief on August 28, 2015. (Dkt. no 36.) Arnold filed his reply brief on
6 September 11, 2015. (Dkt. no 37.) This Court now considers Arnold's appeal.

7 **III. LEGAL STANDARD**

8 18 U.S.C.A. § 3402 provides that "[i]n all cases of conviction by a United States
9 magistrate judge an appeal of right shall lie from the judgment of the magistrate judge to
10 a judge of the district court of the district in which the offense was committed." This
11 Court's review of findings of fact are "governed by the same standards as an appeal
12 from a judgment of a district court to the court of appeals . . . [t]hus, the judgment is
13 reversible only if it is clearly erroneous or contrary to law." *United States v. Ramirez*, 555
14 F. Supp. 736, 738-39 (E.D. Cal. 1983). Issues of law are reviewed de novo. *See United*
15 *States v. Wazelle*, No. CR-F-04-5376 AWI, 2006 WL 2536610, at *3 (E.D. Cal. Aug. 31,
16 2006).

17 **IV. DISCUSSION**

18 The Court need not address the timeliness or completeness of Arnold's notice of
19 appeal because the Court finds, even if the appeal was procedurally proper in all
20 respects, it fails on the merits.

21 Arnold argues that because he did not sign a written waiver assenting to the
22 transfer of venue for the camping violations in California to the District of Nevada, his
23 nolo contendere pleas must be set aside. Federal Rule of Criminal Procedure 58(c)(2)(A)
24 sets forth the "Conditions of Waiving Venue" as follows:

25 If a defendant is arrested, held, or present in a district different from the
26 one where the indictment, information, complaint, citation, or violation
27 notice is pending, the defendant may state in writing a desire to plead guilty
28 or nolo contendere; to waive venue and trial in the district where the
proceeding is pending; and to consent to the court's disposing of the case
in the district where the defendant was arrested, is held, or is present.

1 The government does not dispute that Arnold never signed a written agreement to waive
2 venue. However, the government argues that Arnold's repeated on-the-record
3 affirmations that he understood he was waiving a right to be tried in the jurisdiction of
4 each of the violations overcome any ministerial error. The government relies on a line of
5 cases wherein the Ninth Circuit Court of Appeals has interpreted a similar written waiver
6 requirement of the right to a jury trial and found that the waiver need not be in writing.

7 Federal Rule of Criminal Procedure 23(a)(1) requires a defendant to waive his or
8 her right to a jury trial in writing. The Ninth Circuit has repeatedly recognized that an oral
9 stipulation in front of a judge can satisfy this requirement, even in the absence of a
10 written waiver. *See United States v. Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971)
11 ("An oral stipulation may, under certain circumstances, satisfy the Rule, but it must
12 appear from the record that the defendant personally gave express consent in open
13 court, intelligently and knowingly, to the stipulation."); *see also United States v. Reyes*,
14 603 F.2d 69, 72 (9th Cir. 1979) ("absent a signed writing, it is appropriate to require the
15 trial judge to evaluate, at the time of the stipulation, whether the defendant understands
16 the meaning of the stipulation."); *United States v. Cochran*, 770 F.2d 850, 852 (9th Cir.
17 1985) (same).

18 Rule 58(c)(2)(A) contains a similar waiver requirement as Rule 23(a)(1) — " the
19 defendant may state in writing a desire . . . to waive venue." Fed. R. Crim. P. 58(c)(2)(A).
20 A defendant's waiver of venue must be knowing and voluntary. *See United States v.*
21 *Grinage*, 117 F. App'x 135, 138 (2d Cir. 2004). Arnold argues that Rule 58(c)(2)'s
22 requirement is different than 23(a)(1)'s requirement because it is "inextricably intertwined
23 with waiver of a defendant's rights to a trial before the Magistrate, to confrontation and
24 cross-examination of the evidence and witnesses against him, and to present evidence
25 and witnesses on his own behalf." (Dkt. no. 37 at 4.) The Court agrees that Rule 58(c)(2)
26 protects important due process rights. But the right to a jury trial is equally, if not more
27 important, *see, e.g., Duncan v. Louisiana*, 391 U.S. 145, 153, (1968) (discussing the
28 history of the right to trial by jury and calling such a right "fundamental to our system of

1 justice”), and the Ninth Circuit has found that a clear recorded oral indication of knowing
2 and voluntary waiver is just as good as a written agreement in protecting that right. See
3 *Guerrero-Peralta*, 446 F.2d at 877. The Court sees no reason why that reasoning should
4 not apply to Rule 58.


5 Arnold’s verbal waiver of his right to venue to have the four citations heard in
6 California contains all the indicia of reliability to show he understood his right and
7 voluntarily waived those rights. At the January 30, 2015, hearing, Arnold clearly
8 indicated, at least three times, that he understood the charges were being transferred to
9 the District of Nevada, and he agreed that he wanted them transferred. (Dkt. no. 36-1 at
10 25-27.) Arnold further indicated that he understood that he had the right to a trial in which
11 he could cross examine witnesses against him, but if he did not enter into the plea
12 agreement, he would have to go to California to assert that right. (*Id.* at 28.) The
13 Magistrate Judge accepted Arnold’s plea, implicitly finding that his waiver of venue,
14 given in open court, was knowing and voluntary.

15 Arnold knowingly and voluntarily waived his right to venue with respect to the
16 California citations to permit these violations to be tried in Nevada. The Magistrate
17 Judge’s judgement of conviction is affirmed.

18 **V. CONCLUSION**

19 It is hereby ordered that the Magistrate Judge’s decision is affirmed. The Clerk is
20 instructed to enter judgment and close this case.

21 DATED THIS 16th day of October 2015.

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24 MIRANDA M. DU
25 UNITED STATES DISTRICT JUDGE
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